UNITED STATES
v.
CHARLES J. MACIVER, ET AL.

IBLA 75-282 Decided June 11, 1975

Appeal from decision of Administrative Law Judge Dean F. Ratzman declaring the Half Pint and Gooney Bird placer mining claims null and void. (Contest No. CA 641)

Affirmed.

1. Administrative Procedure: Burden of Proof -- Mining Claims: Contests

When the Government contests a mining claim on a charge of no discovery it bears the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

2. Administrative Procedure: Burden of Proof -- Mining Claims: Contests

Where a government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case has been established.

3. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of

such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a profitable mine.

4. Mining Claims: Discovery: Generally

Evidence of mineralization which may justify further exploration, but not development of actual mining operations, is not sufficient to establish that a discovery of a valuable mineral deposit has been made.

5. Mining Claims: Hearings -- Rules of Practice: Evidence
Evidence tendered on appeal from an adverse decision in a mining claim contest cannot be considered except for the limited purpose of deciding whether a further hearing is warranted. However, such evidence will only be considered if accompanied by a cogent explanation of why it was not tendered at the hearing.

APPEARANCES: Charles F. Lawrence, Esq., Office of the General Counsel, United States Department of Agriculture, for appellee; John H. Lenz, Esq., San Francisco, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Charles J. MacIver, et al., 1/ appeal from the November 20, 1974, decision of Administrative Law Judge Dean F. Ratzman, declaring the Half Pint and Gooney Bird placer mining claims null and void. Both claims are situated in the south half of section 31, T. 1 S., R. 19 E., Mount Diablo Meridian, Tuolumne County, 31, T. 1 S., R. 19 E., Mount Diablo Meridian, Tuolumne County. Stanislaus National Forest, California, approximately four miles from Yosemite National Park.

1/ The other parties are Kent MacIver and Drullard Engineering Company.

The contest proceedings in this case were initiated by issuance of complaints by the California State Office, Bureau of Land Management, which charged that the claims were invalid: 1) due to lack of discovery of a valuable mineral deposit, and 2) the land on which the claims were located is nonmineral in character. 2/ A hearing was held in Oakland, California, on August 26, 1974. Subsequently, Administrative Law Judge Dean F. Ratzman determined that both claims were null and void for lack of discovery of a valuable mineral deposit. Appellants attack that conclusion, averring generally that the evidence establishes that they have made a discovery on the claims. Appellees contend that the decision of Judge Ratzman was correct and should be affirmed.

Appellants attack the method of sampling employed by the Forest Service's mineral examiner on two grounds. First, they suggested at the hearing that the examination could have been more thorough. Second, they state on appeal that all the samples taken should be excluded as one of the samples was taken from a point off the claims.

[1, 2] In suggesting that the mineral examiner's examination could have been more thorough, appellants have apparently misconstrued the division of burden of proof in a mining claim contest. The Government has the burden of presenting a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that the claim is valid, for it is the claimant who is the proponent of an order to declare his claim valid, pursuant to 5 U.S.C. § 556 (1970). Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974), cert. denied, 95 S. Ct. 60 (1974); United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975). The Government has established a prima facie case when a mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery. United States v. Ramsey, 14 IBLA 152, 154 (1974); United States v. Blomquist, 7 IBLA 351 (1972). It is true that the mineral examiner's conclusion must be based on reliable, probative evidence. United States v. Winters, 2 IBLA 329, 335, 78 I.D. 193,

2/ We note that a substantial portion of the lands occupied by these claims are subject to various withdrawals which apparently predate the location of the claims, and which would bar the validity of the claims to the extent of the conflict. However, this was not a matter incorporated in the contest complaint, or presented as an issue at the hearing or upon this appeal and, therefore, we will not undertake to decide the effect of such withdrawals.

195 (1971). But Government mineral examiners are not required to perform discovery work, to explore or sample beyond the claimant's workings, or to conduct drilling programs for the benefit of the claimants. United States v. Ramsey, supra; United States v. Wells, 11 IBLA 253 (1973); United States v. Grigg, 8 IBLA 331, 343, 79 I.D. 682, 688 (1972). In this case appellants refused to cooperate with the Forest Service mineral examiner. As we stated in United States v. Laing, 3 IBLA 108, 112 (1971):

> Claimants who challenge a mineral examiner to discover the alleged valuable mineral deposit for himself assume the risk that he may not be able to do so.

Appellants' other objection to the samples is on sounder ground. The several samples were taken at different points on the claim. However, one of the nine samples was taken slightly off one of the claims. Therefore, the sample has little probative weight. To compound the error, the only assay consists of a combination of concentrates from all nine samples. While in many cases, such a mixture of samples might produce a meaningless result because of possible disparities between samples, we conclude in this case that the error is de minimis. As there was virtually no gold in the concentrate of all the samples, there could not have been any significant amount of gold in the eight samples taken on the claims. In fact the Forest Service's mineral examiner, and expert witness, who spent several days examining the claims testified that the samples contained gold worth approximately three mills per cubic yard. (Tr. 121). The mineral examiner was clearly correct when he testified that a discovery had not been made. (Tr. 124, 139).

[3, 4] Appellants assert that they proved by a preponderance of evidence that they have discovered a valuable mineral deposit on their claims. 3/ However, the evidence submitted at the hearing, including appellants' own testimony, is virtually conclusive that no discovery has been made. The Department defined "discovery" in the context of the law in Castle v. Womble, 19 L.D. 455, 457 (1894):

3/ Appellants' attorney suggested at the hearing that a discovery had been made on the claims in 1952 by one Huff. However, there was no evidence presented on whether there actually was a discovery or even a location (Tr. 140). Even if there had been a discovery, which seems unlikely in light of the evidence, it is clear that a discovery, may be "lost" either physically or through exhaustion of the deposit, or by relatively permanent changes in market conditions. See the cases collected in United States v. Johnson, 16 IBLA 234, 237-38 (1974).

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. (Emphasis added.)

That definition has been approved by the courts many times. Chrisman v. Miller, 197 U.S. 313, 322 (1905); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963). To be sure, the Department does not require a sure thing. See Converse v. Udall, 399 F.2d 616 (9th Cir. 1968); United States v. Kosanke, 3 IBLA 189, 217, 78 I.D. 285, 298 (1971), vacated on other grounds, 12 IBLA 282, 80 I.D. 538 (1973). Nevertheless, the nucleus of value which sustains a discovery must be such that with actual mining operations under prudent management a profitable venture may reasonably be expected to result. Converse v. Udall, supra. Evidence that further exploration is contemplated or may be justified is not evidence that a discovery has been made. Such exploration is not in the nature of development operations on an already-discovered deposit, but is, instead, further exploration for undiscovered deposits. Henault Mining Co. v. Tysk, 419 F.2d 766, 769 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); Barton v. Morton, 498 F.2d 288, 290-91 (9th Cir. 1974); United States v. Gunsight Mining Co., 5 IBLA 62 (1972); United States v. New Mexico Mines, Inc., 3 IBLA 101 (1971), and the discussion therein. Appellants stated a number of times that they are still in the exploratory stage. For example, Kent MacIver testified as follows:

> MR. LENZ: Now, Mr. MacIver, having in mind that we are talking about the discovery and we have been talking about exploration, we haven't really gotten in the matter of development. But do you draw a definition between discovery and exploration and development?
>
> A. Yes, I do.
>
> Q. You do?
>
> A. The exploration would be seeking out potential places to mine.
>
> Q. Yes.
>
> A. And that's the only stage we're at right now.

(Tr. 56, 57).

> Q. Now, you were asked a question somewhat earlier during your examination by Mr. Lawrence with regard to values of ore per yard. Have you ever made any determination on that particular factor?
>
> A. No, I haven't. I've never had no reason to do it. I'm just not to that point; I just don't feel I'm to that point of having assay work done. I feel I will have to get assay work done but I haven't done it yet.

Charles MacIver testified to the same effect. However, appellants assert that Judge Ratzman misinterpreted one of Charles MacIver's statements, to wit:

> Q. And in your opinion, does the taking of these samples constitute a discovery with regard to the probable quality, quantity and value of the property.
>
> A. No. I don't think anyone can give even an educated guess as to the future value of the property. But it does indicate that the value should be further explored.

(Tr. 158).

Appellants assert that the period after the word "No" should be deleted. That would not, however, change the meaning of the testimony. In addition Charles MacIver's later testimony indicates that appellants still regard themselves as being at a stage of exploration:

> MR. LAWRENCE: Have you made any determination of the values per yard in terms of gold in the areas of either of these two claims?
>
> THE WITNESS: No, I think the exploration is just reaching the point where that can fairly be judged.
>
> Q. You're planning to do that?
>
> A. Oh, yes. Uh-huh. At least Kent is.
>
> Q. And I assume also that you have made no determination as to the number of cubic yards of gold bearing gravel?

A. There is no way to determine that at the present time.

Q. You still have to determine the extent to which it is gold bearing; is that correct?

A. Yes. That is exploratory work in the future.

(Tr. 171, 172).

In summary, appellants' own testimony at the hearing indicates that they had no idea of the quantity or quality of any possible gold deposits on their claims. Clearly, there has been no discovery of a valuable mineral deposit on either of these claims.

Appellants argue that the definition of "exploration" contained in 30 U.S.C. § 643 (1970) is applicable here. That definition suggests that exploration means not only the search for undiscovered deposits, but also the development. First, the definition is confined to 30 U.S.C. §§ 641-646 (1970), and in no way applies to the general mining law, 30 U.S.C. § 22 et seq. (1970). Second, even if it were to be applied as appellants suggest, they would not be helped as they have done no actual development work on a discovered deposit. Appellants compound their error by citing a number of cases stating that as long as they are exploring for minerals they are entitled to possession -- the "pedis possessio" doctrine. That doctrine is applicable against the world except for the government, which holds title. As was stated in Mulkern v. Hammitt, 326 F.2d 897 (9th Cir. 1964), "[T]he Government must have the right to possession of its land free from a useless and annoying encumbrance." See also Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964).

[5] Finally, appellants have submitted several vials of material taken from the claims and an assay report of material of a similar nature. The Department's policy has been that evidence tendered on appeal from a mining contest may not be considered except for the limited purpose of deciding whether there is any justification for ordering a further hearing, since the record made at a hearing must be the sole basis for decision. United States v. Clifton, 14 IBLA 146, 151 (1974); Sedgwick v. Callahan, 9 IBLA 216, 230 (1973); United States v. Gunn, 7 IBLA 237, 253, 79 I.D. 588, 595-96 (1972); United States v. Wedertz, 71 I.D. 368, 374 (1964); United States v. Little, A-30842 (February 21, 1968); 43 CFR 4.24. There is, however, no reason for accepting such statements in the absence of a cogent explanation why it could not be adduced at the hearing. The present case illustrates the difficulties with accepting such evidence after a

hearing. First, it is not subject to cross-examination. Second, the evidence is not reliable, that is, it is not the kind of evidence on which responsible persons are accustomed to rely in serious affairs. The assay submitted by appellants indicates that very little gold was contained therein. We are asked by appellants to believe that the gold was removed from the samples before the assay. In support of that statement appellants submit a small vial (Ex. D-12) which they state, contains the gold removed before the assay. They state, as a visual estimate, that the vial contains 100 milligrams of gold. While the substance appears to be gold, it is not possible to estimate either the purity or quantity of gold by visual examination. Therefore, the evidence, as offered, is of little probative value. Furthermore, as we stated in United States v. Taylor, 19 IBLA 9, 82 I.D. __ (1975):

> There should be a reasonable basis for concluding that a further hearing will be productive of the desired additional information before reopening the evidentiary proceedings * * *. (Citations omitted).

19 IBLA at 22.

It is unlikely that a further hearing would develop any further evidence which would support appellants' assertion of discovery.

Finally, we note that appellants had the opportunity to present their evidence at the hearing below and failed to do so. Due process requires notice and an opportunity to be heard. United States v. O'Leary, 63 I.D. 341 (1956). Appellants were given that opportunity. In the absence of a compelling reason to the contrary, due process does not require another hearing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Dean F. Ratzman is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge